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Journal of Law and Policy

Volume 18 | Issue 1 Article 3

2009

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Recommended Citation

Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J. L. & Pol'y (2009).
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TARGET MARKETING OF SUBPRIME LOANS: RACIALIZED CONSUMER FRAUD & REVERSE REDLINING

Linda E. Fisher∗

This article, presented at Brooklyn Law School's 2009 Sparer Public Interest Law Symposium on a panel entitled *Stopping the Next Subprime Crisis*, is part of a larger project of information and strategy-sharing among academics, policy analysts and attorneys involved in foreclosure and predatory lending prevention. The article marshals and analyzes evidence of discriminatory and deceptive marketing practices by subprime mortgage lenders and brokers. It also supports current proposals for policy reforms that could address the misuse of new marketing technologies in this context.

INTRODUCTION

The subprime meltdown created many casualties. Foremost among them are subprime borrowers themselves.[1] While some

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∗ Professor of Law, Seton Hall Law School. I would particularly like to thank Arielle Cohen of the National Consumer Law Center (formerly with the New Jersey Institute for Social Justice) for her assistance in researching the practices I describe in this article. I am also grateful to Marc Poirier for comments and suggestions on an earlier draft.

[1] Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 1–8 (2008). Subprime loans are generally considered those with an annual percentage rate (APR) on a first mortgage that is more than 3% above the comparable Treasury rate. This figure is taken from the Federal Reserve's definition of high rate loans, which has developed into a shorthand

commentators disparage these borrowers for defrauding lenders by misstating their incomes, the reality is much more complicated: evidence is mounting that certain subprime lenders deliberately sought out financially vulnerable borrowers for deceptive sales tactics and predatory mortgage loans. In many cases, loan officers and mortgage brokers—without borrowers' knowledge—concocted false income and assets and ordered inflated appraisals, all to obtain mortgages generating large profits for themselves.[2] For some lenders, these techniques were standard operating practice.[3] There was little incentive to

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working definition of subprime loans. *See* Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. REV. 677, 682 (2009) (citing 12 C.F.R. § 203.4(a)(12) and Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, FED. RES. BULL. (Fed. Reserve Bd., Wash., D.C.), Sept. 8, 2006 at A123-24, *available at* http://www.federalreserve.gov/pubs/bulletin/2006/hmda/bull06hmda.pdf); *see also* Aleo & Svirsky, *supra*, at 1–8 (setting forth a comprehensive definition of subprime mortgages).

My point here is not that all subprime lenders engaged in predatory lending, or that subprime lending is equivalent to predatory lending, but rather that predatory lending was quite prevalent among subprime lenders. The distinction between the two has been explored at length elsewhere. *See* NAT'L PREDATORY LENDING TASK FORCE, U.S. DEP'T. OF HOUS. AND URBAN DEV. & U.S. TREASURY DEP'T., CURBING PREDATORY HOME MORTGAGE LENDING 17 (2000), *available at* http://www.huduser.org/Publications/pdf/treasrpt.pdf [hereinafter PREDATORY LENDING REPORT]; JAMES H. CARR & LOPA KOLLURI, FANNIE MAE FOUNDATION, PREDATORY LENDING: AN OVERVIEW 5–6 (2001), *available at* http://www.knowledgeplex.org/kp/text_document_summary/article/relfiles/hot_topics/Carr-Kolluri.pdf; Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1174–75 (2008).

[2] *See infra* text accompanying notes 69–81. Loan officers, mortgage brokers and other originators were responsible at the ground level for working with borrowers and preparing loan applications. *See* FINDING A MORTGAGE FOR YOUR NEW HOME: BANKS VS. MORTGAGE BROKERS, *available at* http://homebuying.about.com/cs/mortgagearticles/a/home_lenders.htm. These terms are often used interchangeably. *See infra* note 44 (discussing the various ways in which originators and banks worked together to fund mortgages).

[3] For instance, Ameriquest and its affiliate Argent seem to have followed

underwrite carefully because the funding lenders rarely kept the loans in their own portfolios, but rather assigned them to upstream purchasers for packaging into pools of mortgage-backed securities.[4]

Many of those perpetrating these deceptions employed target marketing techniques to generate business. "Target marketing" refers to the practice of developing profiles of desired consumers and using those profiles to designate an audience for a product

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these practices. *See infra* note 69 and accompanying text.

[4] *See* Kathleen C. Engel & Patricia McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending,* 75 FORDHAM L. REV. 2039, 2040–49 (2007); Christopher L. Peterson, *Predatory Structured Finance,* 28 CARDOZO L. REV. 2185, 2207–13 (2007); Patricia McCoy & Elizabeth Renuart, *Legal Infrastructure of Subprime and Nontraditional Home Mortgages* 34–40 (Joint Ctr. for Hous. Studies, Working Paper No. UCC08-5, 2008), *available at* http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08_5_mccoy_renuart.pdf; Benjamin J. Keys et al., *Did Securitization Lead to Lax Screening?* 3 (Dec. 2008) (unpublished manuscript, *available at* http://ssrn.com/abstract=1093137) (concluding that portfolios that are more likely to be securitized default around 10–25% more often than those of a similar risk profile group with a lower probability of securitization); Amiyatosh Purnanandan, *Originate-to-Distribute Model and the Subprime Mortgage Crisis* 2–3 (Apr. 27, 2009) (unpublished manuscript, *available at* http://ssrn.com/abstract=1167786).

For an explanation of the structure of securitized trusts, see NOMURA FIXED INCOME RESEARCH, NOMURA SEC. INT'L, INC., MBS BASICS (2006), *available at* http://www.securitization.net/pdf/Nomura/MBSBasics_31Mar06.pdf and Charles K. Whitehead, *The Evolution of Debt: Covenants, The Credit Market, and Corporate Governance*, 34 J. CORP. L. 641, 655–56 (2009) ("Banks . . . became less interested in holding loans to their maturity in light of the growing ability to enhance returns by selling loan interests to others.").

I use the past tense to refer to subprime lending because most subprime lending has ceased in the past couple of years. *See* Peter M. Zorn et al., *From FHA to Subprime and Back*, *available at* http://ssrn.com/abstract=1365401. For example, twenty of the largest twenty-five subprime lenders are no longer operating: some filed bankruptcy, some failed or are in receivership, while others were purchased by larger entities. *See* John Dunbar & David Donald, *Who's Behind the Financial Meltdown?*, CENTER FOR PUBLIC INTEGRITY, May 6, 2009, http://www.publicintegrity.org/investigations/economic_meltdown/articles/entry/1286/.

pitch.[5] Employing techniques ranging from sophisticated demographic analyses of defined geographic areas to arrangements with local brokers in low-income urban neighborhoods, these subprime lenders focused on borrowers with little knowledge of mortgage lending in general and their own financial options in particular.[6] In fact, many subprime borrowers apparently were sufficiently creditworthy to qualify for prime loans, but were steered into higher cost subprime loans anyway.[7] Other lenders—or the brokers working with them—specifically targeted borrowers already in financial distress and foreclosure for refinancing.[8] Mortgage loans with unjustifiably high interest rates and higher principal balances increased the stream of income for lenders and investors, and resulted in larger commissions for loan officers and brokers; higher points and fees added to the bottom line. This profit

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[5] *See infra* Part I.

[6] This article focuses on the use of target marketing techniques in the promotion of subprime loans in communities of color. Historically, communities of color lacked access to mainstream financial institutions and knowledge of the mortgage market. *See* Raymond H. Brescia, *The Worst of Times: Perspectives on and Solutions for the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 172 (2009) (citing DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 87–108 (2004)) (analyzing discriminatory roots of the subprime crisis and viability of reverse redlining claims under the Fair Housing Act); Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 128–30 (2006).

Many homebuying and mortgage schemes have been perpetrated on residents of black neighborhoods through the years, with their form varying based on conditions at the time. *E.g.*, BERYL SATTER, FAMILY PROPERTIES: RACEL, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA (2009) (recounting contract buying schemes in Chicago in the last century).

[7] *See* CARR & KOLLURI, *supra* note 1, at 7 ("Credit quality alone . . . does not fully explain the extreme reliance of black households on the subprime market. Further research by Freddie Mac reports that as much as 35 percent of borrowers in the subprime market could qualify for prime market loans. Fannie Mae estimates that number closer to 50 percent."); White, *supra* note 1, at 688–89; *infra,* text accompanying note 50.

[8] *See infra* note 103.

making ultimately was detrimental to everyone, but perhaps most of all to the borrowers, a high percentage of whom are or will soon be in foreclosure.[9]

To further complicate the picture, African-American and Latino borrowers took out disproportionately high rates of subprime loans as compared to white borrowers.[10] Of course, not all subprime lending was predatory, but the incidence of predatory practices such as those described here was considerably higher for subprime as compared to prime lending.[11] The available evidence bears out this conclusion.[12]

A number of national studies, controlling for risk factors like income and/or credit score, have substantiated the strong correlation between race and subprime lending.[13] Unsurprisingly,

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[9] *See* Associated Press, *Mortgage Delinquencies Hit Record High in Q1*, N.J. STAR LEDGER, May 28, 2009 ("A record 12 percent of homeowners with a mortgage are behind in their payments or in foreclosure . . . . At the same time, almost half of all adjustable-rate loans made to borrowers with shaky credit were past due or in foreclosure."); Shane M. Sherlund, *The Past, Present, and Future of Subprime Mortgages* 17 (Fed. Res. Bd., Working Paper No. 2008-63, 2008) *available at* http://www.federalreserve.gov/Pubs/feds/2008/200863/200863pap.pdf. ("[M]ore recently originated subprime loans are more likely to default, well ahead of their first mortgage rate resets, and less likely to prepay (i.e., to refinance).").

[10] Brescia, *supra* note 6, at 173.

[11] *See* PREDATORY LENDING REPORT, *supra* note 1. It is not my intent to elide the distinction between predatory and subprime lending, but it is not a primary focus of this paper. *See supra* note 1.

[12] *See infra* text accompanying notes 70–90. The practices described occurred almost exclusively with subprime and Alt-A loans, not prime loans. *See* David Reiss, *Regulation of Subprime and Predatory Lending,* INTERNATIONAL ENCYCLOPEDIA OF HOUSING AND HOME, *available at* http://works.bepress.com/cgi/viewcontent.cg?.article=1027&context=david_reiss.

[13] *See* White, *supra* note 1, at 687–89; DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006) *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/unfair-lending-the-effect-of-race-and-ethnicity-on-the-price-of-subprime-mortgages.html ("Our study analyzed subprime home loan prices charged to different racial and ethnic groups while controlling for the effects of credit scores, loan-to-value ratios, and other underwriting factors . . . .

minority borrowers were significantly more likely than white borrowers both to work with mortgage brokers and to take out high-cost subprime loans.[14] This correlation itself suggests discrimination under either disparate treatment or disparate impact theories; that is, African-Americans and Latinos were either intentionally singled out for the worst loans or have suffered disproportionately from the effects of facially neutral lending policies.[15] The phenomenon of singling out minorities for

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Our findings show that, for most types of subprime loans, African-American and Latino borrowers are at greater risk of receiving higher-rate loans than white borrowers, even after controlling for legitimate risk factors."); *see* PREDATORY LENDING REPORT, *supra* note 1, at 3 ("HUD found that, even after controlling for neighborhood income (although without controlling [sic] for credit history or risk), people living in predominantly African-American communities refinance in the subprime market much more often than people living in predominantly white communities."); NAT'L CMTY. REINVESTMENT COAL., INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II: A COMPARISON OF HIGH-COST LENDING IN AMERICA'S METROPOLITAN AND RURAL AREAS 3 (2008), *available at* http://www.ncrc.org/images/stories/mediaCenter_reports/ncrc%20metro%20study%20race%20and%20income%20disparity%20july%2007.pdf ("[A]fter controlling for creditworthiness and other housing market factors, minorities are receiving a disproportionately large amount of high-cost loans."); *see generally* MARGERY AUSTIN TURNER & FELICITY SKIDMORE, THE URBAN INSTITUTE, MORTGAGE LENDING DISCRIMINATION: A REVIEW OF EXISTING EVIDENCE (1999) *available at* http://www.urban.org/UploadedPDF/mortgage_lending.pdf (reviewing existing studies and evidence).

> [14] [A] significant factor causing minorities to pay higher mortgage rates is their greater likelihood of getting a mortgage through a broker rather than by dealing directly with lenders . . . . [O]ne-half to two-thirds of the pricing disparity between whites and minority borrowers results from the greater likelihood that minority borrowers end up getting mortgages from subprime lenders . . . .[Minority borrowers] are more likely to borrow from lenders that specialize in subprime mortgages . . . and more likely to borrow through brokers interacting with wholesale lenders.

White, *supra* note 1, at 687–88.

[15] This article does not delve into fine points of the doctrine of disparate treatment or disparate impact discrimination, which others have assessed at length. *See, e.g.*, Timothy C. Lambert, Comment, *Fair Marketing: Challenging Pre-Application Lending Practices*, 87 GEO. L.J. 2181 (1999).

predatory loans has been dubbed "reverse redlining."[16] This is a reference to an inversion of the older practice of "redlining," or excluding minority neighborhoods altogether from mortgage lending.[17] Several state and local governments—in addition to nonprofits and private plaintiffs—have sued subprime lenders and brokers for engaging in these activities, alleging violations of the federal Fair Housing and Equal Credit Opportunity Acts and, in many cases, state consumer fraud statutes.[18]

The term racialized consumer fraud, as used in this article, refers to the practice of aiming the most deceptive or unconscionable lending practices at minorities. This article focuses not only on evidence of this phenomenon, or on the link between race and consumer fraud, but also on the extent to

[16] *See, e.g.*, City of Baltimore v. Wells Fargo Bank, N.A., No. L-08-62, 2009 U.S. Dist. LEXIS 56794, at *1 (D. Md. July 2, 2009) (motion to dismiss denied July 2, 2009); City of Baltimore v. Wells Fargo Bank, N.A., __ F. Supp. 2d __, 2010 WL 46401 (D. Md., Jan. 6, 2010) (granting motion to dismiss); *see also* Johnson, *supra* note 1, at 118–127 (examining costs of foreclosures to cities, and current legal responses, including nuisance suits filed by Cleveland and Buffalo, as well as the Baltimore litigation against Wells Fargo).

[17] Assocs. Home Equity Servs. v. Troup, 778 A.2d 529, 537 (App. Div. 2001) ("The term 'redlining' is derived from the actual practice of drawing a red line around designated areas in which credit is to be denied. . . . Congress has reported that 'reverse redlining' . . . [is] the targeting of residents of those same communities for credit on unfair terms.") (citations omitted); *see also* Howell, *supra* note 6, at 105–16 (recounting history of "America's Racial Geography," including redlining).

[18] *See* NAACP v. Ameriquest Mortgage Co., No. SACV 07-0794 AG, 2009 U.S. Dist. LEXIS 66117 (C.D. Cal. Jan. 12, 2009); *Wells Fargo*, 2009 U.S. Dist. Lexis at 56794; Commonwealth v. H&R Block, Inc., No. 2008-2474BLS1, 2008 Mass. Super. LEXIS 427 (Super. Ct. Nov. 25, 2008). In particular, the litigation between the city of Baltimore and Wells Fargo has received a great deal of recent attention because of its revelations of the sort of broker and loan officer conduct that is described here. *See* Julie Bykowicz, *City Can Proceed with Wells Fargo Lawsuit*, BALTIMORE SUN, July 3, 2009, at 10A (stating that federal district court denied motion to dismiss on July 2, 2009). Recently, the State of Illinois filed a similar suit against Wells Fargo. Amy Merrick, *Illinois Sues Wells Fargo Over Mortgage Discrimination*, WALL ST. J., July 31, 2009, *available at* http://online.wsj.com/article/SB124906504187697487.html#.

which target marketing techniques enabled these practices to proliferate. Targeting did so by allowing the worst subprime lenders to concentrate on consumers in narrowly defined geographic or demographic niches and thus increased the efficiency of predatory lending, afflicting entire neighborhoods.[19] For example, patterns of residential segregation in this country allow marketers to search by census tract, segments of a zip code, or similar criteria to derive lists of potential customers that strongly correlate with race, since residents of a single neighborhood tend to be of the same race.[20] In other words, address often serves as a proxy for race. This paper also suggests a possible link between the Furman Center's findings, as presented to this conference, of higher rates of subprime lending to all borrowers living in predominantly minority neighborhoods[21] and the practices described herein; that is, when majority minority areas are singled out and blanketed with solicitations for predatory subprime loans, white residents of the neighborhood can fall prey to these loans as well.[22]

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[19] *See* Alex Kotlowitz, *All Boarded Up*, N.Y. TIMES MAG., Mar. 8, 2009, at 28; Jenny Schuetz et al., *Neighborhood Effects of Concentrated Mortgage Foreclosures*, 14–15 (Furman Ctr. for Real Estate and Urban Policy, Working Paper 08–03, 2008), *available at* http://www.furmancenter.org/files/foreclosures08-03.pdf.

[20] *See* Ruth D. Peterson & Lauren J. Krivo, *Race, Residence and Violent Crime: A Structure of Inequality*, 57 U. KAN. L. REV. 903, 908 (2009) ("[I]n 2000, an average of 65.2% of metropolitan blacks (or whites) would have to move to a different neighborhood to achieve an even residential distribution."); *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 191 (1993).

[21] Vicki Been et al., *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L.J. 361, 380–81 (2009); *see also* Kathe Newman & Elvin Wyly, *Geographies of Mortgage Market Segmentation: The Case of Essex County, New Jersey*, 19 HOUSING STUD. 53 (2004).

[22] Been et al., *supra* note 21, at 382 ("[B]lack and white borrowers are more likely to get a high-cost loan when they are buying a home in a census tract that has a high proportion of blacks. Blacks and whites, in other words, appear to be at a mortgage-cost disadvantage by buying homes in neighborhoods with more black residents.").

This targeting did not always involve a conscious motive to discriminate. There is a distinction between target marketing that explicitly uses race as a criterion and that which uses geography. A further distinction exists between intentionally using geography as a proxy for race and targeting low-income urban neighborhoods, though both created inequitable results in an entirely predictable fashion, with minority borrowers receiving much worse loans than similar white borrowers.[23]

Part I of this article describes the range of current target market techniques and their adaptation to the subprime lending context. Part II provides evidence of racialized consumer fraud in subprime lending, relying on evidence obtained by counsel in reverse redlining and consumer fraud lawsuits, accounts published by the media, and reports I have gathered as a practitioner in the field. Finally, Part III briefly examines selected lawsuits challenging these practices that have recently survived motions to dismiss or resulted in preliminary injunctive relief. Given the evidence, this article argues for increased enforcement of fair housing and lending laws in the mortgage lending context. In addition, consumer financial services reforms must take into account the pernicious use of new targeting technologies and develop means to stanch it.

I. TARGET MARKETING

A. Introduction

In recent decades marketing techniques have become quite sophisticated. Marketers can identify audiences most likely to purchase products ranging from retail goods to financial services. By dividing the population into niches according to characteristics such as household composition, income, age, employment, consumer spending, area of residence, and language spoken, marketers can pinpoint potential customers

[23] This article does not engage in a full doctrinal analysis of disparate treatment and disparate impact fair housing/fair lending claims regarding mortgage lending. For that analysis, see Lambert, *supra* note 15, at 2193–97.

with great refinement.[24] Financial institutions use this process of market segmentation,[25] as it is called, to solicit those most likely to apply for various types of mortgages or credit cards.[26]

Companies typically compile lists of target customers by first culling their own records to determine who bought similar products from them in the past.[27] Next, they purchase reports on these individuals from private services such as credit bureaus that, in turn, have mined information from public records and other sources to build a profile of each individual in the database.[28] That profile frequently includes residential information broken down as finely as ZIP + 4.[29] The dataset is

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[24] For example, the major credit bureaus offer these services. *See* Trans Union Corp. v. FTC, 81 F.3d 229 (D.C. Cir. 1996); Experian List Services INSOURCE Enhancement and List Services, http://www.experian.com/products/insource.html (last visited Sept. 12, 2009); TransUnion Business: Prescreens and Lists, Sales Lead List Software, http://www.transunion.com/corporate/business/serviceSolutions/marketingServices/prescreensLists.page (last visited Sept. 12, 2009). Yahoo also offers marketing services for businesses. Advertising Your Business with Yahoo! Search Marketing, http://sem.smallbusiness.yahoo.com/searchenginemarketing/ (last visited Sept. 12, 2009).

[25] *See* ART WEINSTEIN, HANDBOOK OF MARKET SEGMENTATION: STRATEGIC TARGETING FOR BUSINESS AND TECHNOLOGY FIRMS (3rd Ed. 2004); Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335 (2003).

[26] S*ee* Dennis Gale, *Subprime and Predatory Mortgage Refinancing: Information Technology, Credit Scoring and Vulnerable Borrowers* 9–10 (Fisher Ctr. for Real Estate and Urban Econ., Conference Paper C01-001, 2001), *available at* http://urbanpolicy.berkeley.edu/pdf/Gale.pdf (analyzing effects of increasingly sophisticated technology, including "geodemographic marketing tools" on predatory lending in early years of this decade).

[27] Brad Stone, *The Debt Trap: Banks Mine Data and Woo Troubled Borrowers*, N.Y. TIMES, October 22, 2008, fig. 1; Lambert *supra* note 15, at 2187–92 (1999) (describing these marketing techniques and assessing applicability of fair housing and fair lending claims against their discriminatory misuse).

[28] Lambert, *supra* note 15, at 2187–88; *see also* Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 355–59 (2008) (discussing constitutional issues with respect to information collection for data mining).

[29] ZIP + 4 is a Post Office system of adding four additional digits after a

then analyzed to identify additional common characteristics of the pool of purchasers.[30] After purchasing a new dataset of additional consumers, the companies score individuals in the new set according to their attractiveness as targets for future solicitations.[31]

For example, an entity named Claritas, which is affiliated with Nielsen (best known for its television audience surveys), sells demographic information that can be very finely sliced according to a purchaser's preferences.[32] One of its products, suggestively called P$YCLE, divides people into fifty-eight segments, each with a memorable name, including:

> *29. Retirement Ready*—The nearly-retired Americans in this segment enjoy comfortable lifestyles on middle-class incomes. Although not asset-rich, members of Retirement Ready do invest in real estate and variable-rate annuities, and they've built up enough home equity to take out second mortgages and home equity loans . . . .[33]
>
> *50. Urban Essentials*—With their lower-income wages and low levels of assets, they rank at the bottom for savings, investments and retirement accounts. And many of these urban renters go without auto, life or medical insurance as well. A racially diverse mix of young, urban singles, couples and families, this group is generally limited in its financial behavior to taking out student and

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zip code to break the area down into smaller segments to facilitate mail delivery. *See* http://en.wikipedia.org/wiki/ZIP_code; *see also* Direct Marketing, Mail, Tele, Email and Fax Marketing Programs, www.directmarketinglists.com/contentpages/mortgage.htm (last visited Sept. 18, 2009) [hereinafter Direct Marketing].

[30] Stone, *supra* note 27, at fig.1.

[31] *Id.*

[32] Claritas—P$YCLE Segmentation System, http://www.claritas.com/claritas/Default.jsp?ci=3&si=4&pn=psycle (last visited Sept. 10, 2009). P$YCLE data is provided in a format that is designed to easily combine credit information from the major credit bureaus and other information sources to allow carefully targeted marketing. *Id.*

[33] CLARITAS, IXPRESS FINANCIAL INSIGHT STANDARD COMPONENTS 162 (2007), *available at* www.claritas.com/collateral/data/col_ixpress_financial_db.pdf.

> personal loans and using debit cards at ATMs. . . .[34]
>
> *54. City Strivers*—The majority of residents are under 34 years old, have lower-middle incomes and have income-producing assets only a quarter of the national average. Many are in debt paying off student, car or personal loans—and with their modest bank accounts, they don't pursue long-term investments, retirement savings and life insurance.[35]

Given the potential for misuse, segmentation becomes problematic when race, or proxies for race, are incorporated into defined categories. For instance, the last of P$YCLE's niches clearly references predominantly minority urban populations:

> *58. Bottom-Line Blues*—No segment has fewer income-producing assets, and few rank lower when it comes to income or home ownership. Concentrated in inner-city neighborhoods, the segment is the address for mostly young, multi-ethnic singles and single-parent families living in low-cost apartments.[36]

While ethnic segmenting is not illegal in itself, and can serve seemingly legitimate purposes,[37] it can be discriminatory when combined with the other practices.[38]

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[34] *Id.* at 150.

[35] *Id.*

[36] *Id.* at 151. Arielle Cohen of the New Jersey Institute for Justice calls this phenomenon "virtual redlining." Correspondence from Arielle Cohen, N.J. Inst. for Justice, to Linda E. Fisher, Professor of Law, Seton Hall Law Sch. (September 23, 2008) (on file with author). This term alludes to the use of information technology to cordon off demographic segments and deny them the best credit opportunities. *Id.*

[37] *See, e.g.*, Target Market News, http://www.targetmarketnews.com (last visited Aug. 27, 2009) (calling itself "The Black Consumer Market Authority," which serves as a conduit for products aimed at the black community). I do not single out Claritas as an example of a particularly bad actor—their services seem typical. *See* sources cited *supra* note 24.

[38] *See infra* text accompanying notes 39–67.

B. Target Marketing of Mortgages

As elaborated below, smaller scale, but similar, targeting operations serve mortgage lenders exclusively and provide consumer mortgage data to lenders and mortgage brokers. Public records including recent home sales are merged with mortgage data so that purchasers can identify prospective customers for home equity loans or second mortgages.[39] These entities sell targeting lists containing name, address, date of sale, current market value, loan amount, interest rate, credit score, and foreclosure status. These lists may also offer telemarketing scripts.[40] Some combine neighborhood demographic and credit

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[39] *See* Direct Marketing, *supra* note 29.

> *First Mortgage File*. This file contains homeowner information dating back as early as the [sic] late 1988—over 50 million properties spread across 50 states. From this database, selections can be made on mortgage amount, origination date, lendable equity, lender name and current home values. This database is primarily used to identify homeowners with equity in their property that are candidates for home equity loans.

Id. The company's "Mortgage Profiling Credit Data" includes "Homeowner Mortgage Leads," described in relevant part as follows:

> Sub-Prime: Sub-Prime auto prospects also make good home loan refinance candidates. They are aware that their credit is not perfect and are more flexible when it comes to interest rates, points, and loan fees they are willing to pay to obtain financing.

Id.

[40] *See id*. Another entity called Best Rate Referrals also sells mortgage scripts for telemarketers pitching targeted loans:

> Our *mortgage lead generation system* and *telemarketing mortgage scripts* have helped numerous clients increase their business nationwide through telemarketing . . .
>
> *Quick Mortgage Scripts*: Our *telemarketing mortgage scripts* prompt immediate interest in the homeowner and produce results. These mortgage scripts are perfect for loan officers and telemarketers. We have scripts for all types of mortgage marketing campaigns such as reverse mortgage, refinance, debt consolidation, ARMs, and real estate scripts. *Order today and receive a free mortgage lead sheet*. . . .
>
> FHA / VA Streamline Mortgage Script *Only $4.95*

data to create a credit profile for similar localities sharing chosen characteristics.[41] Thus, racial targeting can be easily accomplished without knowing the race of individuals, given the strong correlation between geography and race.[42]

On an even smaller scale, mortgage brokers also engage in target marketing. They originated—or created—the majority of mortgages in this country in the past decade, with even higher percentages of subprime originations.[43] Many subprime lenders

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> Mortgage Loan Modification Script *Only $4.95*
>
> Mortgage Loan Modification Script *Only $4.95*
>
> Reverse Mortgage Script *Only $4.95*
>
> Refinance—Sub-Prime/Debt Consolidation *Only $4.95*
>
> Refinance—Sub-Prime/Debt Consolidation *Only $4.95*
>
> Refinance—ARM Script *Only $4.95*
>
> Real Estate Lead Script *Only $4.95*
>
> Real Estate Lead Script *Only $4.95* . . .
>
> *Mortgage Script Rebuttals*: *Mortgage Script Rebuttals* are essential for generating interested mortgage prospects. Through our many years of experience we have fine tuned rebuttals for every response to spark interest in the prospect . . . .
>
> 2-Step Mortgage Lead Generation System *Only $99.95* . . .
>
> Hiring & Training Mortgage Telemarketers *Only $99.95* . . .
>
> We include everything you need to start generating mortgage leads your first day of operation.

Telemarketing scripts, http://www.bestratereferrals.com/consulting.html (last visited Sept. 18, 2009) (emphasis in original).

[41] Direct Marketing, *supra* note 29. The Sinclair Company, for instance, informs customers: "[b]y combining summarized credit statistics with other demographic selections you can identify the best candidates for your special offer." *Id*. But it also warns: "[l]ists developed with statistics must be used in a positive or inclusive manner. The information cannot be used to deny or exclude customers from any offer." *Id*.

[42] *See supra* text accompanying note 20.

[43] *See* KEITH ERNST ET AL., CTR. FOR RESPONSIBLE LENDING, STEERED WRONG: BROKERS, BORROWERS, AND SUBPRIME LOANS 6 (2008), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/steered-wrong-brokers-borrowers-and-subprime-loans.pdf.

> While mortgage brokers are active across the entire credit spectrum, they have played a major role in the rapid growth of the subprime mortgage market. . . . This growth was driven by the willingness of

worked primarily with brokers, rather than employing their own loan officers to originate loans.[44] Through their wholesale lending divisions, the lenders relied on a variety of arrangements to fund loans originated by brokers.[45] Brokers were paid with commissions or other premiums.[46] The brokers in turn employed numerous methods to find customers, including targeted techniques such as those previously described.[47] Notably, they

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> subprime lenders to rely on third-party originators. Rather than build brick and mortar storefronts, subprime lenders have recruited brokers and, to a lesser degree, correspondent lenders to market and originate their loans. Together, the loans originated by these third-party originators are described as "wholesale" loans. . . . By 2006, . . . estimates from trade publications reported that such loans accounted for 63 to 81 percent of all subprime loans.

Id.

[44] *Id*. Lenders would reach out to brokers in a number of different ways, including online business. Interview with Jon Steingraber, Realtor, in Newark, N.J. (Sept. 2008). In some cases, lenders would advertise the availability of mortgages with specified terms to borrowers meeting certain profiles; brokers would respond if they had contact with a borrower meeting the criteria. *Id*.

[45] *See* Dominick A. Mazzagetti, *Dealing with Mortgage Loan Brokers: Legal and Practical Issues*, 114 BANKING L.J. 923, 932 (1997). This excerpt describes the varieties of lender/broker (often referred to as "originator") relationships, including:

> *Category 1*: The lender purchases whole loans after closing. The lender provides little or no input during the origination process.
>
> *Category 2*: The lender purchases whole loans after closing but has substantial input in underwriting, compliance, and documentation.
>
> *Category 3*: The lender 'table funds' loans originated and closed in the name of the originator.
>
> *Category 4*: The lender 'table funds' loans originated and closed in the name of the lender.
>
> *Category 5*: The lender becomes involved in loans immediately after application, issues commitments in its own name, and closes the loans in its own name.

Id.

[46] *See infra* text accompanying note 99.

[47] On September 23, 2008, Arielle Cohen posted an inquiry on LinkedIn—"How do mortgage brokers get leads?"—and received these responses:

also depended heavily on local resources, such as realtors and neighborhood word-of-mouth.[48] Lenders could also choose to do

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> 1. Hi. You can do title searches with title companies. Just give them the criteria for the type of geography, tax liens, foreclosures, loan amounts, lender, even Spanish speakers, loan origination dates etc. They can usually do a detailed search for free. Of course they expect your business [sic].
>
> 2. I've used leads generated from databases with homeowner information, along with those that contained credit information. I'm not sure the exact type of data you are looking for but feel free to contact me with any specific questions you may have.
>
> 3. I agree with the above responses . . . . Most of the mortgage brokers and loan officers that I work with get their leads/referrals from realtors. However, I am also a great source of leads for them… my company provides leads based on a number of variables and criteria and are already scrubbed through the DNC [do not call] list. These databases utilize category searches based on zip codes, existing lender information, current interest rate and loan types, etc.
>
> 4. This is one of the biggest mailing list suppliers in the country: http://www.usadata.com/?gclid=CKvs7uiI45UCFQgRFQodixHGfQ [.] You can refine the search list as much as you want. The more detailed list you want the more the list will cost. Meaning if you want a list of men and women the price might be X. But if you want a list of men and women between 25-35 the list might cost you XXX. A lot of information can come with the list and it costs money for each additional item. I am interested in what your [sic] investigating. Don't you work for a non-profit group.
>
> 5. At height of the market the most successful mortgage brokers were getting the majority of their leads from strong relationships with realtors. Although the amount of sales activity in almost every market has decreased this is still the case. However, in this environment you will need to make sure to develop a strong lender network in order to capitalize on those relationships. It will also be imperative to affiliate yourself with an FHA lender, as I believe this will fill the void of the sub-prime business. In regards to using databases, I have had clients that have been successful using leads from title companies and lead generation companies. You can also combine these lists with a refractive dialer, to maximize the results.

Posting of Arielle Cohen to LinkedIn profile page, http://www.linkedin.com (Sept. 23, 2008) (on file with the author).

[48] *See id*. In my own experience litigating predatory lending cases, the brokers involved had connected with the borrower through local

business predominantly with brokers in selected neighborhoods. The targeting techniques described in this article made identification of those brokers simple.

C. Targeting of African-American and Latino Borrowers for Subprime Mortgages

As described above, mortgage brokers played a particularly pivotal role in subprime lending to minorities during the peak years of subprime lending.[49] In addition to obtaining lists of potential customers in a designated area, the brokers utilized ties to local institutions and informal networks to tailor their sales pitches to residents' perceived preferences and affiliations.[50]

Brokers' neighborhood ties gave them direct access to potential customers who might not respond as readily to direct mail or telemarketing solicitations. Moreover, subprime brokers frequently were of the same race as most residents of the neighborhoods in which they worked, increasing the likelihood that they would be trusted.[51] The limited financial options available to most black borrowers created vulnerability to these pitches, augmenting their attractiveness.[52] Moreover, borrowers'

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neighborhood networks. *See, e.g.*, Complaint at ¶ 31, Gibson v. Bethea, No. L–5364–08 (N.J. Super. Ct. Law Div, Essex County Ct. 2008); Ted Sherman, *Investors File Lawsuit Alleging Mortgage Con*, N.J. STAR LEDGER, July 1, 2008.

[49] *See supra* text accompanying notes 15–38.

[50] I was involved in a case in which the pastor of a church was himself a mortgage broker peddling subprime loans to parishioners and others. *Pitman v. Stroedecke, et al.*, No. ESX-L-4083 (Sup. Ct. of N.J., Essex County, 2004). In other cases, local real estate developers worked hand in hand with mortgage brokers to convince local homebuyers to trust them, because they shared the same race and/or religion. *E.g.*, Gibson Complaint, *supra* note 48, at ¶ 36; *see also* Philip Shishkin, *When Rescue Means Eviction*, WALL ST. J., Feb. 25, 2009 (featuring a case I litigated in New Jersey and recounting other cases around the country in which real estate brokers and developers gained the trust of homeowners in trouble, bought their homes, and defrauded them).

[51] *See* Barkley v. Olympia Mortgage Co., No. 04-CV-875, 2007 WL 2437810, at *11 (E.D.N.Y. Aug. 22, 2007); Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 21–22 (D.D.C. 2000).

[52] *See* Dorothy A. Brown, *Shades of the American Dream*, 87 WASH U.

lack of financial sophistication also increased the likelihood that they would trust and believe salespeople who seemed genuinely concerned for their welfare. When the homeowners were facing bankruptcy or foreclosure, desperation often overrode their better judgment.[53]

In one variation, predatory property flippers, working with mortgage brokers and others, would solicit first-time minority homebuyers with "one-stop shopping" schemes that involved purchasing and financing sales of substandard homes.[54] The flippers make false promises to the buyers and misrepresent the condition and cost of the homes. The brokers and their co-conspirators then put the borrowers into predatory loans. Both use the targeting techniques described in this article to lure in unsuspecting buyers. A typical example is described in *Barkley v. United Homes*.[55] First, the flippers used targeted advertising "featuring minority consumers."[56] They also "placed ads in the *Caribbean Life* community newspaper that serves the West Indian immigrant community, while not advertising in community papers that are part of the same newspaper chain but serve primarily white neighborhoods."[57] Finally, they used "race-conscious outreach strategies" such as pairing salesmen

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L. R. (forthcoming 2010) (manuscript at 20, 49–50, *available at* http://www.law.emory.edu/fileadmin/faculty_documents/dabrown7/Shades_Law_Review_Version.doc_compatability_Mode_.pdf) (discussing [at n. 58 & 71] reasons why black renters have been less likely to apply for mortgages than whites, and why, when investing, blacks have often preferred to invest conservatively in real estate as opposed to stocks or bonds).

[53] This has frequently been my own experience, as well as that of consumer attorneys in general. *See, e.g.*, *Colson v. Reed*, No. L-5294-97 (Sup. Ct. of N.J., Essex County), as well as the cases referred to *supra*.

[54] *See Barkley*, 2007 WL 2437810. I have litigated similar cases in the Newark area. *See, e.g.*, Gibson v. Bethea, No. L–5364–08 (N.J. Super. Ct. Law Div, Essex County Ct. 2008).

[55] *Barkley*, 2007 WL 2437810 (denying motion to dismiss in property flipping case with claims against scammers under 42 U.S.C. §§ 1981–82, 1985(3)).

[56] *Id.* at *11.

[57] *Id.*

and buyers of the same race.[58] I have seen several such examples in my own litigation practice in Newark.[59]

Certain subprime lenders bypassed brokers and directly targeted their products to specific African-American and Hispanic divisions, euphemistically referred to as "Emerging Markets Departments."[60] Recent affidavits from former Wells Fargo employees submitted in the *City of Baltimore v. Wells Fargo* litigation, discussed *infra*, provide details.[61] For instance,

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[58] *Id*. Other documented examples in reported cases include Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 21–22 (D.D.C. 2000) (denying summary judgment where defendant mortgage company located its offices in predominantly black communities, used local brokers, distributed targeted flyers and ads in the same neighborhoods, and "exhibited photos of famous black leaders standing with the company's president in an alleged 'attempt to convey a message to African-Americans that [the president] could be trusted.'"); and Honorable v. Easy Life Real Estate Sys., Inc., 182 F.R.D. 553, 561 (N.D. Ill. Sept. 30, 1998) (certifying class in Fair Housing Act case and relying on allegations that "defendants preyed on the plaintiff class by targeting their advertising to unsophisticated, first-time home buyers in the racially segregated Austin community, materially misrepresenting the condition and value of homes offered for sale . . .").

[59] *See* Complaint, Gibson v. Bethea, No. L–5364–08 (N.J. Super. Ct. Law Div, Essex County Ct. 2008).

[60] *See, e.g.*, Business Wire, *Option One Appoints Larry Gilmore Vice President of Emerging Markets*, ALL BUS., April 7, 2006, http://www.allbusiness.com/banking-finance/banking-lending-credit-services-mortgage/5466275-1.html.

> Minority homeownership rates are still a fraction of that of the general population, and shifting demographics and demographic growth among all minorities make understanding the needs of emerging markets more important now than ever . . . . "We're developing a long-term strategy in Emerging Markets that will include the new type outreach and partnerships to provide the best quality services," said Gilmore. "We will also look at developing unique products to meet the needs of our country's diverse population."

Id.

[61] *See* Affidavit of Elizabeth Jacobson, Mayor of Baltimore v. Wells Fargo Bank, N.A., No. 08-cv-00062 (D. Md. June 1, 2009) (opposing Wells Fargo's motion to dismiss and submitted as Attachment M to Baltimore's Amended Complaint); Affidavit of Tony Paschal, *Wells Fargo*, No. 08-cv-

the Emerging Markets manager informed one employee that she was "too white" to appear at a "wealth building" seminar in an African-American community and discuss "alternative lending," the bank's code for subprime lending.[62] Another Wells employee, who worked in a division targeting zip codes with predominantly black populations, related that fellow employees referred to subprime loans as "ghetto loans."[63] Further, he explained that the bank had software to generate marketing materials for minorities, including a flyer "to persons speaking the language of 'African-American.'"[64]

The lenders tailored their advertising and sales pitches to these populations, and operated out of branch offices in or near targeted neighborhoods.[65] Some would blanket the neighborhoods with flyers featuring photos of black or Latino customers and public figures.[66] Again, while targeting is not *per se*

00062 (opposing Wells Fargo's motion to dismiss and submitted as Attachment N to the Amended Complaint); *see also* Complaint, People v. Wells Fargo & Co., No. 09CH26434 (Ill. Ch. Div., Cook County Ct. July 31,2009).

[62] Jacobson Affidavit, *supra* note 61, at ¶ 29.

[63] Pascal Affidavit, *supra* note 61, at ¶ 8.

[64] *Id.* at ¶ 11.

[65] *See* Ramirez v. Greenpoint Mortgage Funding, Inc., No. C08–0369, 2008 WL 2051018, at *1 (N.D. Cal. May 13, 2008) (noting lender branches were located in white neighborhoods, while broker outposts were located in minority neighborhoods, with brokers frequently charging more fees than lenders); Johnson v. Equicredit Corp. of Am., No. 01–C–5197, 2002 WL 448991, at *1 (N.D. Ill. March 22, 2002) (noting prime lender Bank of America located more often in white neighborhoods, while its subprime subsidiary Equicredit had offices almost exclusively located in minority neighborhoods). Two students of mine who were former employees of subprime lenders confirmed these lender tactics with me, as did Tamara Loatman-Clark, the attorney I have worked with who was interviewed by the American News Project. Interviews with Aaron Gould (Dec. 22, 2008); D.B. (July 15, 2007) and Tamara Loatman-Clark (May 4, 2009), Newark, New Jersey.

[66] *See* Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 21–22 (D.D.C. 2000). A former student of mine described a situation in which acquaintances blanketed a minority neighborhood with racially targeted flyers at the behest of a local mortgage broker. *See* Interview with Aaron

discriminatory, it easily becomes so when the loans offered contain terms significantly worse than those offered to similarly situated white borrowers, which was the norm in the instances I recounted.[67]

II. CONSUMER FRAUD IN PREDATORY SUBPRIME LENDING

The phenomenon of predatory subprime lending is by now well documented and has been defined and described in detail elsewhere.[68] Although no single definition of predatory lending exists, the phenomenon generally encompasses a variety of deceptive and unconscionable commercial practices that also constitute violations of unfair and deceptive acts and practices—or consumer fraud—statutes.[69] In the mortgage lending context, these practices usually began with solicitations and aggressive, overbearing sales tactics employed against a financially unsophisticated target population. Typically, borrowers in foreclosure or those with low incomes but substantial equity in their homes would be solicited for refinances. For example, the Ninth Circuit upheld a jury verdict in a fraud class action against First Alliance Mortgage Company, which employed

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Gould, *supra* note 65.

[67] *See infra* note 117 and accompanying text (describing the preliminary injunction obtained by the Massachusetts Attorney General in a reverse redlining suit against subprime lender Option One and H & R Block); *see also* Press Release, Fed. Trade Comm'n, Mortgage Lender Agrees to Settle FTC Charges that it Charged African-Americans and Hispanics Higher Prices for Loans (Dec. 16, 2008), *available at* http://www. ftc.gov.

[68] *See generally* RICHARD BITNER, CONFESSIONS OF A SUBPRIME LENDER: AN INSIDER'S TALE OF GREED, FRAUD, AND IGNORANCE (2008) (detailing the rise and fall of the subprime lending market); Johnson, *supra* note 1, at 1178–80 (explaining predatory subprime loans); Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. POVERTY L. & POL'Y 73, 76–80 (1999).

[69] *See generally* CAROLYN CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (Nat'l Consumer Law Ctr. 7th ed., 2008). A number of federal statutes, such as the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, may also apply. *E.g.*, Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 1201 *et seq.*

scripted sales pitches to mislead mostly elderly borrowers about loan costs.[70] The jury also found Lehman Brothers liable for aiding and abetting the fraud by financing the loans.[71]

Frequently, outright fraud was involved in the origination of predatory loans: brokers or loan officers falsified income and asset information on borrowers, and ordered inflated appraisals that overstated the value of the property.[72] Over and over again in my litigation practice representing borrowers who unwisely trusted local brokers, I have seen mortgage applications filled out by brokers and loan officers—without borrower involvement—that contain wild exaggerations of the borrowers' income and assets.[73] As a result of this fraud, the homeowners

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[70] *See, e.g.*, *In re* First Alliance Mortgage Co., 471 F.3d 977 (9th Cir. 2006) (upholding jury verdict in fraud class action against mortgage company that employed scripted sales pitch to mislead borrowers about loan costs; also upholding verdict against Lehman Bros., which financed the loans).

Moreover, it should be noted that subprime borrowers were not unwittingly pulled into bad loans, and some seem to have overstated their income—rather than having a mortgage broker fill out their loan application. However, I have not seen evidence of that in my own practice representing borrowers in predatory lending litigation in New Jersey, although I do see evidence of broker fraud regularly. *See* Kareem Fahim, *In New Jersey, Dreams of a Better Life Dashed by Foreclosure Crisis*, N.Y. TIMES, May 19, 2009.

[71] *First Alliance*, 471 F.3d at 989.

[72] *See, e.g.*, *Road to Ruin: Mortgage Fraud Scandal Brewing*, Huffington Post, May 13, 2009 *available at* http://www.huffingtonpost.com/2009/05/12/road-to-ruin-mortgage-fra_n_202016.html. Tamara Loatman-Clark, a Brooklyn attorney and former employee of subprime lender Argent, is interviewed in this video about the fraudulent practices she observed at Argent; I am also interviewed. *Id.*; *see also* DENISE JAMES ET AL., MORTGAGE ASSET RESEARCH INST., ELEVENTH PERIODIC MORTGAGE FRAUD CASE REPORT TO: MORTGAGE BANKERS ASSOCIATION (2009) (reporting that incidents of mortgage fraud increased 26% between 2007 and 2008), *available at* http://www.marisolutions.com/pdfs/mba/mortgage-fraud-report-11th.pdf.

[73] This practice has been documented by the FBI and others. *See, e.g.*, FED. BUREAU OF INVESTIGATION, 2008 MORTGAGE FRAUD REPORT "YEAR IN REVIEW" (2009) [hereinafter FBI 2008 REPORT], *available at* http://www.fbi.gov/publications/fraud/mortgage_fraud08.htm#3 (describing nature and incidence of current fraud schemes). This practice occurred in

were induced to take out mortgages with onerous terms that were unsuited to them and impossible to repay.[74]

Thus, after paying unconscionable closing costs,[75] borrowers were saddled with mortgages whose principal balance exceeded fair market value and whose terms were not disclosed to them.[76] During the peak subprime lending years of 2004 through 2006,[77] so-called "exotic mortgages" with high adjustable rates setting in after a trial period, interest-only mortgages that were negatively amortizing, and similarly onerous loans were taken on by many borrowers who lacked a full understanding of the terms of their loan.[78] Moreover, many subprime borrowers actually had credit scores sufficient to qualify for prime mortgages but were steered into subprime loans that were more profitable to lenders.[79]

Others took out refinance loans with high fees that rolled their unsecured credit card debt into secured debt.[80] Indeed, some lenders promoted this practice as part of their lending strategy, and encouraged serial refinances because they made additional fees on each transaction.[81] Deceptive sales pitches that

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almost every subprime lending case I have litigated in the last five years.

[74] *See* Engel & McCoy, *supra* note 4 at 2043.

[75] *See* MELISSA HUELSMAN, A BRIEF PRIMER ON PREDATORY LENDING PRACTICES (ABA General Practice Section Newsletter, Sept., 2005), *available at* http://www.abanet.org/genpractice/newsletter/lawtrends/0509/business/predatorylending.html.

[76] Over appraisals resulted in loans that were underwater from the beginning, because the homes were never worth as much as the inflated appraisal indicated. *See generally* BITNER, *supra* note 68 (discussing appraisal fraud).

[77] *See* Edmund L. Andrews, *Fed Shrugged as Subprime Crisis Spread*, N.Y. TIMES, Dec. 18, 2007.

[78] Engel and McCoy, *supra* note 4, at 2076.

[79] *See supra* note 7.

[80] *See* LISA JAMES & JABRINA ROBERTS, CTR. FOR RESPONSIBLE LENDING, RISKING HOMES TO PAY OFF CREDIT CARDS 1–2 (2005), *available at* http://www.responsiblelending.org/credit-cards/research-analysis/ip012-Risking_Homes_Credit_Cards-1105.pdf.

[81] A former student of mine worked for HSBC's subprime unit several years ago. Interview with Aaron Gould, HSBC, in Newark, N.J. (Dec. 16, 2008). He described how the bank would draw people into high-interest loans and solicit them again for mortgage refinancing after the original loans' terms

misrepresented the terms and nature of these mortgage products were frequently used.[82] Whether lenders relied on brokers or their own loan officers to originate loans, they often engaged in scant underwriting and made few efforts to verify the legitimacy of the applications and documentation presented to them.[83] Because it was more profitable to flip the loans upstream than to fully confirm the information provided on loan applications, that step was bypassed and mortgages were quickly assigned to securitizers.[84]

Although these widespread practices occurred before the recent financial meltdown all but eradicated subprime lending, it should be noted that mortgage fraud, far from abating, has only expanded since the foreclosure crisis began.[85] The perpetrators

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became impossible to meet. *Id.* The strategy was to put borrowers into a position of increasing financial desperation, which would break down their resistance to taking out a new loan with unfavorable terms. *Id. See also* Daniel Wagner, *Bank Employees Protest "Anti-Consumer" Practices,* ABC NEWS, June 29, 2009, http://abcnews.go.com/Business/wireStory?id=7961452 ("Bank of America and other large banks encouraged customer service representatives and tellers to burden consumers with debt and enroll them in high-fee programs . . . .").

[82] Engel & McCoy, *supra* note 4, at 2088; *see also supra* text accompanying notes 49–57.

[83] I have frequently seen loan applications containing obviously false information accepted and funded by subprime and Alt-A lenders. Stories of cases resulting in convictions around the country are reported daily by The Mortgage Fraud Reporter, Mortgage Fraud News, http://www.mortgagefraud.org/journal (last visited Aug. 27, 2009). *See also* Keys et al., *supra* note 4 (listing lax underwriting at origination as a cause of later default).

[84] *See* Engel & McCoy, *supra* note 4, at 2039–43.

[85] *See, e.g.*, FBI 2008 REPORT, *supra* note 73 (describing nature and incidence of current mortgage fraud schemes); Press Release, U.S. Dep't of Treasury, *Federal, State Partners Announce Multi-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud*, Apr. 6, 2009, *available at* http://www/treas.gov/press/releases/tg83.htm (describing incidence of mortgage fraud). Recently, federal and state authorities have been prosecuting foreclosure rescue scammers both criminally and civilly as such schemes have proliferated, but I have been involved in litigating these cases for over ten years. In April of this year, the President also signed into law the Fraud Enforcement Recovery Act of 2009, which provides expanded enforcement powers to federal prosecutors in this area. *See* Fraud

adapt to the times and craft their pitches to address changing circumstances. In one variation—which began years ago but has become quite common recently—mortgage brokers work with foreclosure rescue scammers to target homeowners in foreclosure, offering to "temporarily" purchase their homes and rent them to the victims while they attempt to repair their credit. A straw purchaser takes title and finances the purchase with a mortgage arranged by the broker. The scammers then leave the former owners without title to the home, may evict the tenants and resell the property, use the sale to skim equity from the home and then let it fall into foreclosure, or otherwise profit from the transaction at the expense of the former homeowners.[86] This pattern, as described in the New York case of *Watson v. Melnikoff*, is typical and has been replicated across the country.[87]

Another prevalent variation involves loan modification scams.[88] In the wake of the widely-publicized efforts of

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Enforcement Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617 (2009); *see also* Howard Goodman, *The Fraud Squad*, HUFFINGTON POST, June 22, 2009, www.huffingtonpost.com/2009/6/22/the-fraud-squad_n_218910.html (describing the Act and current efforts to attack new mortgage frauds in South Florida).

[86] I have represented numerous clients victimized by similar scams, and the New Jersey Attorney General's office is currently proceeding against a number of large foreclosure rescue rings. *See, e.g.*, Press Release, N.J. Office of the Attorney General, Attorney General Announces Mortgage Fraud Lawsuits: 10 Defendants Charged in Two Separate Loan Modification Cases (July 15, 2009), *available at* http://www.nj.gov/oag/newsreleases09/pr20090715a.html. Similar stories from across the country are common. *See also* FBI REPORT, *supra* note 73 (describing the varieties of mortgage fraud).

[87] Watson v. Melnikoff, 19 Misc. 3d 1130(A), (N.Y. Sup. Ct. 2008) (quieting title in favor of plaintiff and voiding fraudulent mortgage and title transfer). *See also In Re* Curriden, No. 05-38352, 2007 WL 2669431 (Bankr. D.N.J. Sept. 6, 2007). Another current problem for homeowners is that many subprime lenders failed to escrow for property taxes, leaving borrowers unaware that their taxes were not being paid. Many tax foreclosures have resulted. *See* Editorial, *Another Way to Lose the House*, N.Y. TIMES, Aug. 27, 2009.

[88] *See* Tara Siegel Bernard, *Avoiding Firms that Prey on Troubled Homeowners*, N.Y. TIMES, June 13, 2009; Peter S. Goodman, *Subprime Brokers Back as Dubious Loan Fixers*, N.Y. TIMES, July 20, 2009, *available*

government and nonprofit agencies to assist homeowners to modify their mortgages, a new generation of scammers has rushed in.[89] Many are former mortgage brokers[90] who falsely represent to borrowers that they must pay to obtain the services of a loan expert. In this way, the scammers demand substantial upfront fees.[91] At best, these scammers do little more for borrowers than make a few phone calls, or engage in other efforts that borrowers could obtain elsewhere at no cost.[92] At worst, they just take the money and run, leaving homeowners with false hopes and no avenue of redress.[93]

III. THE RACIALIZATION OF CONSUMER FRAUD & REVERSE REDLINING

Predatory lending and consumer fraud occur when loan terms and fees cross the threshold of unconscionability, or when borrowers are enticed by deceptive sales practices and misrepresentations.[94] Unsurprisingly, these practices have often been aimed at distinct segments of the population thought to be financially vulnerable—minorities, seniors, and sometimes single women.[95] As recounted previously, black and Latino borrowers

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at http://www.nytimes.com/2009/07/20/business/20modify.html.

[89] *See* Bernard, *supra* note 88.

[90] *See* Goodman, *supra* note 88.

[91] *See* Bernard, *supra* note 88.

[92] *See* Goodman, *supra* note 88.

[93] *See* Bernard, *supra* note 88. Yet another recent variation involves targeting senior citizens for reverse mortgages, by sending them official-looking correspondence that appears to be from a government agency, cites various federal laws, and seems to offer government benefits. For example, a Sept. 4, 2009 letter from HECM Disbursement, Washington D.C., entitled *Section 255 of the National Housing Act (12 U.S.C. 1715z-20) is amended: Notification of Eligibility: Identification Papers Issued to Received as Filed*, is actually from the Eagle Nationwide Mortgage Company (on file with author).

[94] *See supra* text accompanying notes 68–69.

[95] *See* PEDATORY LENDING REPORT, *supra* note 1, at 4–5 ("[M]inorities, women, and the elderly bear the brunt of abusive mortgage lending practices, particularly in predominantly minority or low-income neighborhoods that do not have access to mainstream sources of credit.").

in particular received a disproportionate share of the highest-cost subprime mortgages with less favorable terms than those made to similar white borrowers, even after controlling for risk-related factors.[96] Targeted marketing of these mortgages amplified and intensified the worst lending practices by increasing both the pool of borrowers and their susceptibility to manipulative sales pitches.

As set forth in many of the recent reverse redlining complaints surviving motions to dismiss, subprime lenders facilitated discriminatory lending by using discretionary pricing policies that encouraged mortgage brokers and loan officers working in minority neighborhoods to oversell.[97] For instance, brokers received yield spread premiums, a form of commission, for placing borrowers into loans with higher interest rates than par, the rate for which the borrowers actually qualified.[98] The

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[96] *See* BOCIAN ET AL., *supra* note 13, at 3; PREDATORY LENDING REPORT, *supra* note 1, at 3; *see also* Paul Jackson, *NY AG: Mortgage Brokers Admit to Fee Gouging, Discrimination*, HOUSINGWIRE, Jan. 6, 2009, http://www.housingwire.com/2009/01/06/ny-ag-firms-settle-predatory-lending-claims/ (reporting that as part of settlement with the New York Attorney General, brokers admitted charging higher fees to hundreds of black and Latino borrowers).

[97] *See* Brescia, *supra* note 6 (analyzing discriminatory roots of the subprime crisis and viability of reverse redlining claims under the Fair Housing Act); John L. Ropiequet & L. Jean Noonan, *Recent Developments in Fair Lending: The Dawn of a New Litigation Era?*, 64 BUS. LAW. 563, 564 (2009); Stuart T. Rossman, *The Foreclosure Crisis: Can Impact Litigation Provide a Response?*, *in* 13TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE COURSE HANDBOOK, 195, 202–04 (Practicing Law Inst. Ed., 2008); Christopher J. Willis & Catherine S. Bernard, *Recent Subprime Mortgage Lending Class Actions Under the Equal Credit Opportunity Act and Fair Housing Act: An Analysis of Class Certification Issues*, *in* 13TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE COURSE HANDBOOK, 163, 165 (Practicing Law Inst. Ed., 2008). Although the discretionary pricing policies were applicable to all borrowers, brokers and loan officers working in minority neighborhoods allegedly pushed local borrowers harder than white borrowers were pushed to take out high-cost loans that yielded higher commissions. *See, e.g.*, Martinez v. Freedom Mortgage Team, Inc., 527 F. Supp. 2d 827, 835 (N.D. Ill. 2007).

[98] Loan officers and brokers could be entitled to a percentage of the difference in revenue to the lender resulting from the higher rate loan. Ware

discretionary pricing policies also allowed brokers to profit from charging additional non-risk based fees[99] to borrowers.[100] Brokers were therefore incentivized to steer unwitting borrowers, including those with good credit who could have qualified for better terms, to the highest-cost loan products.[101]

Making matters worse, brokers—and some lenders—frequently targeted minority neighborhoods because they assumed residents would respond favorably to their pitches for these high-cost loan products.[102] This is because borrowers with few financial options, or those unaware of other options, were more likely to take out higher-rate loans through subprime originators working in their neighborhoods.[103] Moreover, brokered loans tend to cost more than direct loans—generating fees for brokers and lenders—and loans given in minority neighborhoods were more likely to be brokered than in white neighborhoods.[104] The lenders funding these loans allegedly

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v. Indymac Bank, 534 F. Supp. 2d 835, 839 (N.D. Ill. 2008).

[99] *See* White, *supra* note 1.

[100] Guerra v. GMAC LLC, No. 2:08–cv–01297, 2009 U.S. Dist. LEXIS 449153, at *4 (E.D. Pa. Feb. 20, 2009); Ramirez v. Greenpoint Mortgage Funding, No. C08-0369, 2008 WL 2051018, at *4–5 (N.D. Cal. May 13, 2008).

[101] Commonwealth v. H&R Block, No. 2008-2474BLS1, 2008 Mass. Super. LEXIS 427, at *1 (Super. Ct. Nov. 25, 2008) (denying motion to dismiss and granting preliminary injunction); Complaint at ¶¶ 40–43, People v. Wells Fargo & Co., No. 09CH26434 (Ill. Ch. Div., Cook County Ct. July 31, 2009).

[102] *See* Carol Necole Brown, *Intent and Empirics: Race to the Subprime* 27–42 (Univ. of N.C. Research Paper No. 1426142, 2009), *available at* http://ssrn.com/abstract=1426142 (relying on cultural affinity hypothesis, according to which lenders discriminate against borrowers with whom they do not share a cultural affinity because they have no context to evaluate creditworthiness, to explain racial targeting of subprime loans).

[103] *See supra* note 6 and accompanying text.

[104] Many of the complaints also include allegations that the defendant lenders worked with brokers more frequently in minority than in white neighborhoods, and knew that brokered loans were more expensive than direct loans. *See, e.g.*, *Ramirez*, 2008 WL 2051018 at *1; *see also* White, *supra* note 1, at 687–88.

knew of the disparate racial impact of their pricing policies.[105]

Compounding the problem, lenders failed to conduct serious underwriting, which encouraged originators to use inflated appraisals that overstated the market value of a home.[106] The lack of underwriting also encouraged originators to falsify loan applications by inflating a borrower's actual income and assets.[107] Perhaps the greatest broker profits, however, came from commissions and fees earned from increased lending volume.[108] Greater loan volume is precisely where careful targeting produced the greatest rewards.

A number of the reverse redlining suits have been framed exclusively as civil rights violations, with liability theories premised upon violations of both the federal Fair Housing and Equal Credit Opportunity Acts, which prohibit, respectively, racially discriminatory actions affecting housing or the availability of credit.[109] For instance, the plaintiffs in the

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[105] *See, e.g.*, Ware v. Indymac Bank, 534 F. Supp. 2d 835, 840 (N.D. Ill. 2008); Martinez v. Freedom Mortgage Team, 527 F. Supp. 2d 827, 835 (N.D. Ill. 2007).

[106] *Ware*, 534 F. Supp. 2d at 838–39; Barkley v. Olympia Mortgage Co., No. 04-CV-875, 2007 WL 2437810, at 1* (E.D.N.Y. Aug. 22, 2007).

[107] *Ware*, 534 F. Supp. 2d at 838–39.

[108] *See* ERNST ET AL., *supra* note 43, at 33 ("Brokers have strong incentives to originate mortgages in large volume and relatively little incentive to scrutinize whether the loans will perform over time.").

High sales volume was particularly important where subprime loans were bundled and sold into securitized pools, *id.*, since the pools had to be filled within ninety days to comply with tax law.

[109] For example, many of these cases involve claims under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq. See* Guerra v. GMAC LLC, No. 08-cv-01297, 2009 U.S. Dist. LEXIS 449153, at *1 (E.D. Pa. Feb. 20, 2009); Taylor v. Accredited Home Lenders, 580 F. Supp. 2d 1062, 1064 (S.D. Cal. 2008); Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 253 (D. Mass. 2008); *Ramirez*, 2008 WL 2051018, at *2; Zamudio v. HSBC N. Am. Holdings, Inc., No. 07-c-4315, 2008 WL 517138, at *1 (N.D. Ill. Feb. 20, 2008); Jackson v. Novastar Mortgage, No. 06-2249, 2007 WL 4568976, at *1 (W.D. Tenn. Dec. 20, 2007). Some of the complaints also allege violations of 42 U.S.C. §§ 1981–82. *See* John Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629

representative disparate impact case of *Miller v. Countrywide Bank, N.A* alleged that:

> Countrywide's Discretionary Pricing Policy has a widespread discriminatory impact on African-American applicants for home mortgage loans, in violation of the Equal Credit Opportunity Act [citation omitted] and Fair Housing Act [citation omitted]. That system . . . makes African-Americans over three times more likely than white borrowers to receive a high-APR [annual percentage rate] home loan and two times more likely to receive a high-APR refinancing loan. The disparity . . . is not fully explained by any objective indicia of creditworthiness, such as credit history, credit score, debt-to-income ratio, or loan-to-value ratio. Instead, they argue that a significant portion of the disparity is explained by Countrywide's pricing policy, which explicitly allows for subjective price markups . . . . These . . . have a disparate impact on African-American home buyers.[110]

According to the court, these allegations sufficed to withstand a motion to dismiss because the plaintiffs had sufficiently pled that a specified policy was the proximate cause of the racially disproportionate effects they challenged.[111]

The evidence in certain reverse redlining cases includes practices that would constitute consumer fraud as well.[112] The City of Baltimore provided evidence that Wells Fargo employees steered borrowers qualifying for prime loans to more costly subprime loans by misleadingly telling minority applicants that only subprime loans could be processed quickly and that mandatory prepayment penalties could be waived, but not informing them about the higher cost of subprime loans.[113] State

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(2008) (placing the Baltimore *Wells Fargo* litigation in broader legal context).

[110] *Miller*, 571 F. Supp. 2d at 253 (internal citations omitted).

[111] *Id*. at 255–58.

[112] *See supra* text accompanying notes 72–84.

[113] Jacobson Affidavit, *supra* note 61, at ¶¶ 12. Similar tactics apparently extended to Wells Fargo's efforts to hire loan officers. Several years ago, I interviewed a former Wells Fargo subprime division employee who explained

statutes typically prohibit the use of false and deceptive sales tactics such as these. For instance, the New Jersey Consumer Fraud Act prohibits the "act, use or employment . . . of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate."[114] These practices were perpetrated disproportionately upon African-American and Latino borrowers, and cannot be justified on neutral business necessity grounds because white borrowers with similar credit scores and other risk characteristics received better loans than the inferior, high-cost products foisted on minority borrowers. Thus, the acts alleged could constitute race discrimination, as well as consumer fraud.[115]

Some reverse redlining suits, however, have asserted both civil rights and consumer fraud violations.[116] A prominent example is *State of Massachusetts v. H & R Block, et al.*, in which a state court denied a motion to dismiss and issued a preliminary injunction requiring Attorney General approval before proceeding with foreclosures on presumptively unfair

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that the bank sought to hire loan officers by claiming it was providing valuable credit opportunities to new and previously neglected pools of borrowers, though these borrowers were actually taken advantage of and given inferior products. Interview with P.T., in Montclair, N.J., (Feb. 2006).

[114] N.J. STAT. Ann. §56:8–2 (2009).

[115] *See* Lambert, *supra* note 15, at 2203–14 (analyzing the applicability of both disparate treatment and disparate impact theories to claims of discriminatory credit marketing). *See also* Aleo & Svirsky, *supra* note 1; Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409 (1998).

[116] *See, e.g.*, Ware v. Indymac Bank, 534 F. Supp. 2d 835, 838 (N.D. Ill. 2008); Newman v. Apex Fin. Group, Inc., No. 07 C 4475, 2008 WL 130924, at *1 (N.D. Ill. Jan. 11, 2008); Martinez v. Freedom Mortgage Team, Inc., 527 F. Supp. 2d 827, 834–35 (N.D. Ill. 2007); Johnson v. Equicredit Corp. of Am., No. 01 C 5197, 2002 WL 448991, at *1 (N.D. Ill. Mar. 22, 2002); Assocs. Home Equity Servs. v. Troup, 343 N.J. Super. 254, 262 (App. Div. 2001).

categories of mortgage loans.[117] The complaint alleged not only that the defendants engaged in unfair lending practices, but also that targeting was used to steer minority borrowers to inferior mortgages:

> [The defendants] produced and distributed to its [sic] employees, loan officers, and brokers written marketing and educational materials explaining that the limited choices available to black and Latino borrowers made them good candidates for the [defendants'] subprime loan products and that loan originators should focus on the "emerging markets" of black and Latino homebuyers . . . [The defendants] described this "emerging market" as potential buyers who may have credit concerns, a lack of familiarity with the credit system, and difficulty demonstrating conventional credit history.[118]

The combination of both anti-discrimination and consumer fraud claims better captures the reality of targeted predatory lending. Existing anti-discrimination and consumer fraud statutes are sufficiently broad to encompass these targeting practices, and the lawsuits I have described have the potential to shape the law to effectively address those practices. The level of enforcement efforts, however, has not kept pace with the severity of the problem.[119] The next section addresses recent legislation and proposals that have the potential to increase both the efficacy and level of enforcement efforts.

IV. FEDERAL RESPONSES TO REVERSE REDLINING

The use of target marketing to funnel mortgages with disadvantageous terms to residents of minority neighborhoods warrants further attention from regulators as well as courts.

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[117] Commonwealth v. H&R Block, Inc., No. 2008-2474BLS1, 2008 Mass. Super. LEXIS 427, at *92 (Super. Ct. Nov. 25, 2008).

[118] Complaint at ¶¶ 120, 121, Commonwealth v. H&R Block, Inc., No. 2008-2474BLS1, 2008 Mass. Super. LEXIS 427 (Super. Ct. June 3, 2008).

[119] *See, e.g.*, Andrews, *supra* note 77.

While sellers have identified potential buyers based on their susceptibility to fine-tuned sales practices for centuries, today's highly refined marketing technologies have increased the efficiency of sharp selling practices and functioned as tools for discrimination.[120] Unfortunately, the profit-making frenzy that developed during the peak subprime lending years caused not only low-level scammers to prey on black and Latino borrowers, but also drew larger lenders and banks into the picture. The need for increased enforcement of existing law is self-evident, but new regulation that focuses particularly on the practices addressed in this article could prevent future problems while remedying past ones.

The federal government has recently taken steps to ensure greater regulation of mortgage brokers through the Secure and Fair Enforcement for Mortgage Licensing Act (the S.A.F.E. Act). Part of the Housing and Economic Recovery Act of 2008, the S.A.F.E. Act establishes uniform licensing and registration requirements for "loan originators."[121] While reasonable licensing requirements will likely help prevent some of the worst originator abuses of the peak subprime lending years, more is needed. Legislators and regulators also need to address the role of lenders in pushing overly complex and predatory loans on unsuspecting borrowers and ignoring standard underwriting requirements in their rush to profit from assigning the mortgages into securitized trusts.

The proposed Consumer Financial Protection Agency (CFPA) could provide additional protections for borrowers.[122]

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[120] *See* Lambert, *supra* note 15, at 2203–14.

[121] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1502(1), 122 Stat. 2850 (2008). This legislation provides a regulatory floor for states, and specifies that HUD will establish a system for noncompliant states; *see also* Bob Tedeschi, *Cracking Down on Certain Brokers*, N.Y. TIMES, June 7, 2009, at RE6 ("[T]he F.H.A. is tightening its review of mortgage professionals who are permitted to originate its loans."); Bob Tedeschi, *Monitoring Loan Officers,* N.Y. TIMES, Aug. 23, 2009, at RE9.

[122] Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009). In June of 2009, the Obama administration proposed a single agency to regulate consumer financial products. *See* Mike Allen & Eamon Javers, *Barack Obama to Create Consumer Financial Protection*

For the first time, the CFPA would consolidate regulation of all consumer financial products—including mortgages—under the aegis of a single agency whose sole mission and priority would be to safeguard the rights of consumers.[123] This agency's mandate would be to "promote transparency, simplicity, fairness, accountability and access in the market for consumer financial products or services."[124] It would have authority, *inter alia*, to prohibit unfair and deceptive practices in the financial

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Agency, POLITICO, June 17, 2009, http://www.politico.com/news/stories/0609/23790.html; *see also Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing on H.R. 3126 Before the H. Financial Servs. Comm.*, 111th Cong. (2009). Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard University, has made public statements supporting administration proposal for new Consumer Financial Protection Agency:

> If we don't feed high-risk, high-profit loans into the system, those risks will not get sliced and diced into questionable asset-backed securities and sold throughout the financial system. If we had a Consumer Financial Protection Agency five years ago, Liar's Loans and no-doc loans would never have made it into the financial marketplace—and never would have brought down our banking system. The economic system took on so much risk—one household at a time—that it destabilized our entire economy.

Id.

[123] *See* U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION 55–70 (2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf [hereinafter TREASURY REPORT]; *see also* Binyamin Appelbaum, *As Subprime Lending Crisis Unfolded, Watchdog Fed Didn't Bother Barking*, WASH. POST, Sept. 27, 2009 (reporting that the Federal Reserve, which has enforcement authority in this area, ignored evidence of subprime lending a abuses for years); Edmund L. Andrews, *Banks Balk at Agency Meant to Aid Consumers*, N.Y. TIMES, June 30, 2009, at B1; Press Release, Ctr. for Responsible Lending, Top Policies for Addressing the Foreclosure Crisis (Aug. 2009), *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/mortgage-solutions-final.pdf (informing readers that while other agencies have made consumer protection a low priority, this new agency would have the single mission of protecting consumers from financial abuses in mortgages, credit cards, bank overdraft fees, and other financial products).

[124] H.R. 3126 § 121.

products market.[125] Moreover, the CFPA would restrict the ability of originators—whether brokers or subprime lenders—to mislead borrowers with inordinately complex financial products.[126] Finally—and most critical to this article—the agency would have the authority to curb reverse redlining and the racialization of consumer fraud by enforcing the Equal Credit Opportunity Act and the Community Reinvestment Act.[127] Bringing enforcement of antidiscrimination law under the same umbrella as enforcement of other consumer protection law should amplify the power of each to eradicate the array of illegal practices that enabled the current crisis. The complexities of the problem demand that each issue not be addressed in isolation.

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[125] *Id.* at §§ 131–39. The Obama administration recently withdrew its original proposal to give the new agency the power to require lenders to offer "plain-vanilla" mortgages, with simpler and more straightforward pricing. *See* TREASURY REPORT, *supra* note 123, at 66; Damian Paletta and Kara Scannell, *Democrats Soften Financial Bill*, WALL ST. J., Sept. 24, 2009.

[126] TREASURY REPORT, *supra* note 123, at 66.

[127] *Id.* at 58–59, 69–70.